

United Cable Television Corp. and Freight Checkers, Clerical Employees and Helpers Union, Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 32-CA-4771

December 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND ZIMMERMAN

Upon a charge filed on August 13, 1982, by Freight Checkers, Clerical Employees and Helpers Union, Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on United Cable Television Corp., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on August 27, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on June 29, 1982, following a Board election in Case 32-RD-327, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about August 17, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 8, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 17, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 24, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Sum-

mary Judgment should not be granted. On October 2, 1982, Respondent filed a response to the Notice To Show Cause. On October 8, 1982, the Charging Party filed a "Request for Extraordinary Relief." On October 12, 1982, Respondent filed a response to the Charging Party's request and also filed its own request for extraordinary relief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Respondent's answer admits the Union's request for bargaining and Respondent's refusal to bargain, but attacks the validity of the Union's certification on the basis of Respondent's objections to the election in the underlying representation proceeding.² The General Counsel argues that all material issues have been previously decided. As we have previously considered the objections in question, we agree with the General Counsel.

Our review of the record in this proceeding, including the record in Case 32-RD-327, reveals that on September 10, 1981, pursuant to a Stipulation for Certification Upon Consent Election, an election was held among the employees in the stipulated unit. Following the conclusion of the election, the ballots were impounded because of the pendency of unfair labor practice charges filed by the Union against Respondent in Cases 32-CA-3698 and 32-CA-3903. On November 13, 1981, the ballots were opened and counted and the official tally of ballots was served on the parties. The tally of ballots showed that, of approximately 63 eligible voters, 35 cast valid ballots for, and 28 against, the Union; there were no challenged ballots. After conducting a hearing on Respondent's objections, the Hearing Officer on March 8, 1982, issued her

² The record reveals that, in a letter to Respondent's attorney dated August 12, 1982, the Union's attorney stated that:

Union Secretary-Treasurer Ben Leal has demanded that United Cable begin negotiations with Local 856. I understand that on behalf of United Cable you have informed Secretary-Treasurer Leal that United Cable refuses to negotiate with Local 856 despite the Board certification. If this is incorrect, please let me know. Local 856 continues to demand that United Cable meet and negotiate for a new collective bargaining agreement. Local 856 is prepared to meet immediately at any mutually agreed location to commence negotiations.

By return letter dated August 17, 1982, Respondent's attorney acknowledged receipt of the union attorney's letter and responded that "It is correct United Cable Television Corporation refuses to negotiate with Teamsters Union, Local 856 at this time." As the basis for this refusal, Respondent's attorney asserted that the Hearing Officer and the Board had erred in dismissing Respondent's objections in the representation proceeding and "[t]he Company simply has no choice other than vindication at the Circuit Court of Appeals."

¹ Official notice is taken of the record in the representation proceeding, Case 32-RD-327, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

report recommending that the objections to the election be overruled. Thereafter, Respondent filed exceptions to the Hearing Officer's Report on Objections. On June 29, 1982, the Board adopted the Hearing Officer's recommendations and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.³

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times material herein, a Delaware corporation with offices and places of business in Hayward, San Leandro, San Lorenzo, and Foster City, California, where it is engaged in providing retail cable television services directly to individual subscribers. During the past 12 months, Respondent derived gross revenues in excess of \$100,000, and received goods and services valued in excess of \$5,000 which originated outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Freight Checkers, Clerical Employees and Helpers Union, Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees including installers, technicians, dispatchers, bench technicians, and clerical employees employed at the Employer's four locations in Hayward, San Leandro, San Lorenzo, and Foster City, California; excluding confidential employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On September 10, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on June 29, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 10, 1982, by telephone, and August 12, 1982, by letter, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 17, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 17, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

³ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.⁴

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

⁴ The Charging Party requests extraordinary relief, alleging that Respondent's refusal to bargain is based on patently frivolous grounds and is interposed solely for the purpose of delay. The Charging Party asks that the Board order Respondent to pay the costs, expenses, and attorney's fees incurred by the Union in the underlying representation proceeding and in this unfair labor practice proceeding, as well as any similar costs, expenses, and fees incurred if this case is taken before any circuit court of appeals. The Charging Party also requests the Board to award the Union any costs, expenses, and fees incurred in negotiations with Respondent; access to employee or Respondent time to discuss negotiations; and access to Respondent's bulletin boards to explain this proceeding and negotiations. Finally, the Charging Party wants the Board to direct that any agreement reached as a result of negotiations be made retroactive to the date of the election, September 10, 1981.

These extraordinary remedies are not warranted in this case and we decline to include them in our remedy. In particular, there is no reason to issue a retroactive bargaining order here, as opposed to the usual order requiring Respondent upon request to bargain with the Union. *M. Lowenstein Corporation*, 264 NLRB No. 14, fn. 6 (1982). While the Board has granted the remedy of reimbursement of certain costs where it has found that the asserted defenses were so insubstantial as to be patently frivolous, *Tiidee Products, Inc.*, 194 NLRB 1234, 1236-37 (1972), we do not find that Respondent's defenses here constitute frivolous litigation.

Respondent similarly requests that the Board award it costs, expenses, and attorney's fees incurred from January 14, 1982, to date. This request is also denied.

CONCLUSIONS OF LAW

1. United Cable Television Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Freight Checkers, Clerical Employees and Helpers Union, Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees including installers, technicians, dispatchers, bench technicians, and clerical employees employed at the Employer's four locations in Hayward, San Leandro, San Lorenzo, and Foster City, California; excluding confidential employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since June 29, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 17, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, United Cable Television Corp., Hayward, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Freight Checkers,

Clerical Employees and Helpers Union, Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees including installers, technicians, dispatchers, bench technicians, and clerical employees employed at the Employer's four locations in Hayward, San Leandro, San Lorenzo, and Foster City, California; excluding confidential employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Hayward, San Leandro, San Lorenzo, and Foster City, California, facilities copies of the attached notice marked "Appendix."⁵ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁵ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Freight Checkers, Clerical Employees and Helpers Union, Local No. 856, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time employees including installers, technicians, dispatchers, bench technicians, and clerical employees employed at the Employer's four locations in Hayward, San Leandro, San Lorenzo, and Foster City, California; excluding confidential employees, professional employees, guards and supervisors as defined in the Act.

UNITED CABLE TELEVISION CORPORATION